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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 2.

HARTFORD-EMPIRE COMPANY, F. GOODWIN SMITH, BARTLETT ARKELL, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF ON BEHALF OF CERTAIN MEDIUM SIZED GLASS MANUFACTURING COMPANIES WITH RESPECT TO THE REMEDY; APPEARING BY COUNSEL AS AMICUS CURIAE.

WALTER H. BUCK,
As Amicus Curiae.

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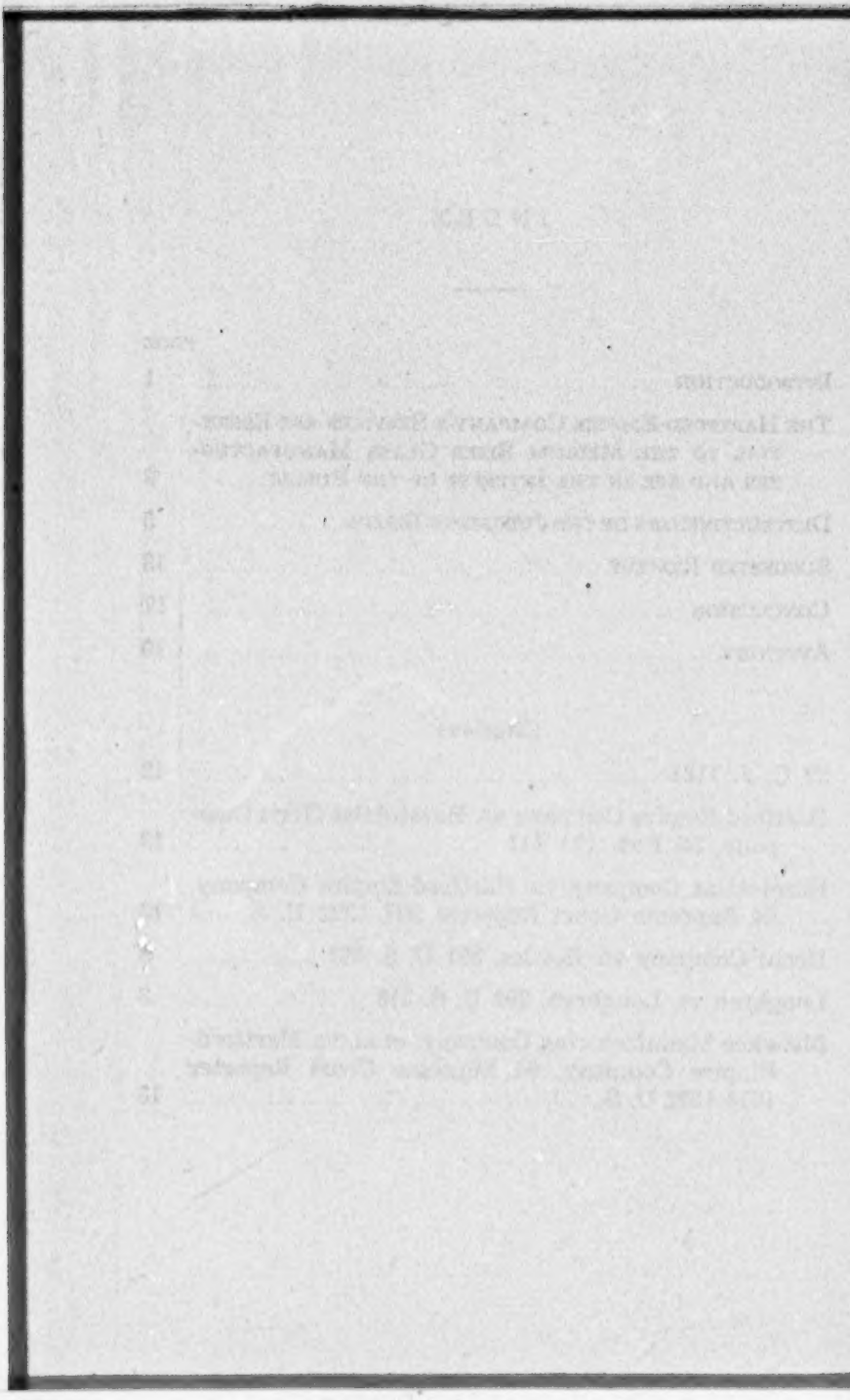

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INTRODUCTION.

The parties hereto are The Buck Glass Company, a Maryland corporation; Latchford-Marble Glass Company, a California corporation; Northwestern Glass Company, a Washington corporation; Chattanooga Glass Company, a Tennessee corporation; Laurens Glass Works, Inc., a South Carolina corporation; Maryland Glass Corporation, a Maryland

corporation; Universal Glass Products Company, a West Virginia corporation; The Diamond Glass Company, a Pennsylvania corporation; Foster-Forbes Glass Company, an Indiana corporation, and Pierce Glass Company, a Pennsylvania corporation, appearing by amicus curiae. These medium sized glass manufacturing companies, through their attorney, Walter H. Buck, filed a brief in these proceedings in No. 7, October Term, 1943. They had first appeared by petition in this case in the District Court asking to be heard through counsel as amicus curiae on the point of remedy only. Though, as the record shows, they had every reason to believe such an opportunity would be afforded them by the Court before judgment was entered, yet in fact judgment was entered and they were ignored. We now again file a short brief herein with the consent and through the courtesy of the Solicitor-General and of the appellants. This brief has been carefully prepared in the hope that it will merit and receive consideration.

This case is unique and important, and the power of this Court to formulate a decree which will be effective in a practical way is unquestionable.

With much that appears in the excellent brief of the Government we are in agreement. However, contrary to the Government's position, we submit that especially as to the Hartford-Empire Company the judgment below is harsh, arbitrary, destructive, and unworkable, and *is in the nature of punishment for past acts,* no matter what the intent may have been in its formulation. (Gov. Brief, p. 352). We submit, too, that such an approach to the formulation of the judgment is both unsound and improper.

> "The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the par-

ticular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity an instrument for nice adjustment and reconciliation between the public interest and private needs, as well as between competing private claims".

Hecht Co. v. Bowles, 321 U. S. 321, at p. 329.

In the Government's brief, p. 358, the doctrine of "clean hands" is referred to, and though technically that doctrine applies to a plaintiff or other moving party, yet the words of a great Judge of this Court are fully applicable in this case and should be borne in mind—

"Equity does not demand that its suitors shall have led blameless lives".

Loughran v. Loughran, 292 U. S. 216, at p. 230.

The proper enforcement of the anti-trust laws is necessary for the continuance of our free economy despite the inherent difficulty in the application of such laws in particular cases. This Court's order of May 15, 1944 shows that violations of the anti-trust laws have been found, and further argument is now limited to the propriety of the decree.

THE HARTFORD-EMPIRE COMPANY'S SERVICES ARE ESSENTIAL TO THE MEDIUM SIZED GLASS MANUFACTURERS AND ARE IN THE INTEREST OF THE PUBLIC.

The record shows that the medium sized glass manufacturers are dependent upon the Hartford-Empire Company not only for the use of that Company's glassware manufacturing machinery, but also for the skilled technical services in its installation and continued proper functioning.

The record also shows that the medium sized glass manufacturing companies have been able to keep their plants

in a modern, competitive position only because of the services supplied by the Hartford-Empire Company, and that some of the medium sized glass manufacturing companies were in a precarious competitive position until the Hartford-Empire's services were supplied. Tr. 10777, 10783, 10788, 10796, 10838, 10874, and offer of proof Tr. 10859.

The Government concedes that as a result of the operation of the Hartford-Empire Company, the production of glassware has increased; the quality of glassware has improved, and the cost of glassware has been reduced. (R. 5329.)

And the Government concedes, too, in its brief, that no specific prices for particular kinds of glassware were agreed to by the appellants. (Gov. Brief, p. 245).

The formulation of a proper decree in this case calls for judicial statesmanship of the highest order, which will not only result in preventing violations of the anti-trust laws now found to have taken place, but which will at the same time accomplish that result with the least disturbance to business and with the least injury to the public. The Government says (Gov. Brief, p. 329):

> "The issue now is whether the decree is properly framed to remove the existing evil consequences of appellants' acts and to prevent appellants from promptly resuming in new guises the illegal conduct that created those consequences."

We submit that the decree is not properly framed for such purposes, and that it is harsh, arbitrary, destructive, and unworkable. We submit, too, that the decree can be properly framed

> "* * * to remove the existing evil consequences of appellants' acts and to prevent appellants from promptly resuming in new guises the illegal conduct that created those consequences".

Any decree which has the effect of substantially injuring the Hartford-Empire Company as a research, engineering and servicing organization, will not only tend to the destruction of the medium sized glassware manufacturers who have depended upon that Company for machinery and technical services, but will also logically result in leaving the few large manufacturers of glassware (which large manufacturers have their own research and servicing departments) with a virtual monopoly in the glassware field. These large manufacturers are referred to by the Government as being of "enormous size". (Gov. Brief, p. 298).

With regard to the smaller manufacturers, the weakness of their position with reference to research and machinery is indicated in the Government's brief, p. 363, as follows:

> "The smaller licensees, who, in most cases, had never been in the machinery business, had little opportunity to invent; they lacked the resources, the access to information, and the experience that modern research requires".

DESTRUCTIVENESS OF THE JUDGMENT BELOW.

We submit, first of all, that the plan of the judgment in attempting to regulate the future conduct of the parties in a complicated and detailed manner is unsound, and would make the enforcement of such a judgment all but impossible.

We suggest that it will be convenient to consider the Government's position in this case, in order to attempt making helpful suggestions for a proper decree:

Government Point 1 complains of the combination of Hartford and Corning to eliminate competition between them in the production and distribution of glass-making machinery, and of their division of the fields of glassware. (Gov. Brief, pp. 22, 29 and 32).

Government Point 2 complains of the combination between Owens and Hartford (including Corning) to control the glassware industry and to obtain patent domination over glass-ware making machinery, and to "stabilize" the market for glassware. (Gov. Brief, pp. 36, 40 and 52).

Government Points 3 and 4 complain of a later combination of Hazel with Owens and Hartford for the purposes referred to. (Gov. Brief, pp. 97 and 113).

Government Point 5 complains of Owens, Hartford and Lynch corporation combining to consolidate the licensing of forming machines. (Gov. Brief, p. 117).

Government Point 6 complains that Owens and Hartford have combined to control the manufacture and licensing of lehrs. (Gov. Brief, p. 136).

Government Point 7 is the milk bottle combination. (Gov. Brief, p. 139).

Government Point 8 is the fruit jar combination. (Gov. Brief, p. 146).

Government Point 9 has to do with the Glass Container Corporation, and its "quota" plan. (Gov. Brief, p. 157).

As to all the matters referred to above, we agree that such combinations should be enjoined and the various agreements, plans, and combinations should be set aside. This will include Pars. 1 to 9 inclusive of the judgment.

Paragraphs 10 to 20 inclusive of the judgment and Paragraph 46 having to do with the receivership should be set aside. This leaves for consideration Government Point 10, the "Patent Pool" and the Hartford-Empire license system. The proper determination of these matters is vital to the medium sized glass manufacturers. In the prayers for relief to be found in the Government's complaint,

Prayer 9 asks "That the defendant Hartford-Empire Company be dissolved and that its patents and other properties be rearranged under several separate and independent corporations, independently owned, in such a way as will terminate effectively the aforesaid monopoly or monopolies and prevent further violations of the Sherman Anti-Trust Act". There are cases in which the dissolution or splitting up of corporations may be desirable from the standpoint of the enforcement of the anti-trust laws. *But we submit that after a consideration of the evidence in this case it would be little short of absurd from a public standpoint to dissolve a research, engineering and servicing corporation like the Hartford-Empire Company, even if the interests of the medium sized glassware manufacturers were given no consideration.*

The fact that dissolution would be improper is now frankly recognized by the Government, thus:

> "The dissolution of a company whose assets consist chiefly of patents and an integrated research and engineering organization obviously involves difficulties not present in the case of an ordinary commercial or manufacturing company which owns physically separable properties". (Gov. Brief, p. 335).
>
> "Obviously, the dissolution or disintegration of the specialized research and development organizations would be difficult and perhaps undesirable". (Gov. Brief, p. 364).

Whatever potentialities for harm the Hartford-Empire Company may have heretofore possessed, there is nothing in this record to indicate that the public suffered any injury from the way in which it has conducted its business. We repeat, the Government conceded at the trial that as a result of the operations of the Hartford-Empire Company the production of glassware has increased; the quality of

glassware has improved and the cost of glassware has been reduced. (R. 5329). In the price of the glassware paid by the ultimate users the portion of such price represented by royalties is infinitesimal. With the dissolution and annulment of the various agreements, plans and combinations referred to in Points 1 to 9 inclusive of the Government's Brief, pp. 22 to 157 inclusive, the important matter remaining is the consideration of the Hartford-Empire Company's licenses.

The Government's objections to the Hartford-Empire Company's licenses are clearly stated in Paragraphs 201 to 218 inclusive of its complaint. Shortly stated, these objections are that the licenses were restrictive as to type and quantity of glassware which the licensees were permitted to produce; that licenses were limited in number, and also because of the refusal to license a number of parties who applied for licenses. Provisions in the leases providing that improvements made by licensees to the licensed machinery should become the property of the Hartford-Empire Company, that the licensees would not contest patents, and also limiting the use of certain machines with other kinds of machines made by the Hartford-Empire Company, were also objected to.

We assert, therefore, that with the inter-Company agreements dissolved and annulled, the really important part of the decree respecting the Hartford-Empire Company, the medium sized glass manufacturing companies, and all others who may hereafter need the Hartford-Empire Company's services is to remove the restrictions complained of by changing the Hartford-Empire Company's licensing system. To keep the Hartford-Empire Company in effective operation as a research, development, and engineering company would seem to be directly in the public interest and as shown is now frankly admitted by the Government.

Instead of doing that, the District Court's judgment, on the one hand, seeks to force the Hartford-Empire Company for the first time, into the manufacture of glassware. (Judgment, par. 50). On the other hand, it deals with the Hartford-Empire Company's business in such a way as to all but wreck it. Paragraph 21 of the judgment prohibits the Hartford-Empire Company from hereafter licensing machinery, and requires its outright sale. Paragraph 22 requires the Hartford-Empire Company to sell to the present licensees the leased machinery at "reasonable prices"; such prices to be fixed by the Court in case of dispute. Paragraph 23 requires the Hartford-Empire Company hereafter to agree to sell its machinery to any applicant at "reasonable and equal prices * * *", and detailed provisions follow as to credit, price structure, market conditions and other matters.

Paragraph 24a requires the Hartford-Empire Company to permit any applicant (styled licensee) to make or to have made for such licensee any machines covered by patents now owned by the Hartford-Empire Company and to license the same without royalty or charge of any kind.

Paragraph 24b requires the Hartford-Empire Company to permit any applicant (styled licensee) to make or to have made for such licensee any machines covered by patents which may hereafter be granted to the Hartford-Empire Company, and to license the same at a "reasonable" royalty.

Paragraph 24c requires the Hartford-Empire Company to make available at cost plus a reasonable profit to any applicant-licensee referred to in Paragraph 24a and Paragraph 24b copies of all drawings and patterns of machines. It will be seen that any research and servicing organization in competition with Hartford-Empire Company could,

under the provisions of Paragraphs 24a and 24c combined, make its own machines; the cost to such competitor being what could only be a trifling amount, that is, the mere cost of copying the drawings and patterns and a profit on that which must cost but little. Thus, the competitor in effect has free access to the old patents and by a combination of Paragraphs 24b and 24c he will also have free access to the new patents. Under Paragraphs 24b and 24c combined the Hartford-Empire Company is not only restricted to a "reasonable royalty" on its new patents but it is restricted in other and important ways, which restrictions would not apply to any such competitor. Under these provisions no one can say how many of such machines, if any, will be made and sold by the Hartford-Empire Company. Assuming, however, that all of such machines were made and sold by the Hartford-Empire Company, the Court has, in effect, destroyed the business of the Hartford-Empire Company by prohibiting licensing on any terms and by requiring the outright sale of all of its patented machines, (Paragraph 21 of the Judgment) and by subjecting it to competition with the competitive conditions weighted against it. Who would believe that thus limited to the sale not of a patented market product sold in large quantities, but of what can amount only to a limited number of fabricating machines, if any, together with any service charges which may be collected, the Hartford-Empire Company could continue to exist as the kind of an integrated research and engineering organization which it must be to give effective service and whose disintegration or dissolution the Government now admits, after consideration of the evidence, is undesirable? (Gov. Brief, pp. 335 and 364).

The disintegration or dissolution of the Hartford-Empire Company would leave the medium sized glass manufacturers in a position in which they could not compete in

the glassware field; eventually resulting in their destruction. This would not only entail a disturbance in the economic life of a wide area in this country, but it would also result in leaving the glassware field in the control of a few large glass manufacturers which are able to and do maintain their own technical, research, and experimental departments. The Government's brief is significantly silent on the point of the future of the Hartford-Empire Company, except to say in a note at the bottom of page 185 of its brief, "Hartford could continue as a distributor and servicer of machines"! But our references to the provisions of Paragraphs 24a, 24b, and 24c have already shown that Hartford's competitors can make Hartford's machines and they can of course service such machines.

Consider, too, the brief filed in this case in No. 7, October Term 1943, by counsel as amicus curiae for the Knox group of licensees. A careful analysis of that brief will show that all it does is to assert three times without giving reasons that the "existence" of the Hartford-Empire Company is not threatened by the District Court's judgment. But a company which merely exists as a distributor and servicer of a limited number (if any) of fabricating machines, is obviously not the kind of a company which could provide the quality and type of research, engineering, and technical service required to keep abreast of the accelerated pace of modern industry.

Consider, too, the Government's point (Gov. Brief, p. 364). There it is suggested that not only will the condemned practices be resumed (though enjoined by the Court), but in addition the excellence of the research of the Hartford-Empire Company and the large manufacturers of glassware seems to be considered as an evil in

itself. Thus, after conceding that the dissolution of such a company as the Hartford-Empire would not only be difficult but undesirable, (Gov. Brief, pp. 335 and 364), and after agreeing that the Hartford-Empire Company should not be punished for past acts (Gov. Brief, p. 352), the position of the Government nevertheless seems to be that though the Hartford-Empire Company's mere existence should not be terminated, yet something ought be done to limit its effectiveness and therefore inevitably to limit the quality of its service.

The requirements of "reasonable prices" in paragraphs 22 and 23, and "reasonable royalties" in Paragraph 24b, illustrate the arbitrary and unusual nature of the judgment. Reasonable with respect to what? In rate cases, after a rate base has been established a fixed percentage or "reasonable" rate of return is allowed. "Reasonable" is "a generic term difficult of adequate definition. It is a relative term". *52 C. J. 1181.* Indeed, the Government concedes (Gov. Brief, p. 375) "what a fair valuation for those machines will be cannot now be ascertained. It is to be noted, too, that the term "reasonable" is not one of the many terms defined in paragraph 1 of the judgment. The fixing of "reasonable" royalties would, therefore, in effect be the exercise of arbitrary power by way of judicial fiat.

Not only is the judgment destructive of the Hartford-Empire Company as an efficient research, engineering and servicing organization for the glass industry, but to attempt even to keep that Company in "existence" under the complicated and detailed provisions of the judgment would seem to require the full time of the Court below.

SUGGESTED REMEDY.

Remembering the "flexibility" and "practicality" of equity an "an instrument for nice adjustment and reconciliation between the public interest and private needs, as well as between competing private claims" (*Hecht Co. v. Bowles*, 321 U. S. 321), it would be strange indeed if equity were now so impotent as to be unable to formulate a proper decree in this case.

In such formulation, we submit, three matters should be considered:

(1) The agreements, plans, and combinations described in the Government Points 1 to 9 inclusive in its brief (Gov. Brief, pp. 22 to 162, inc.) should be set aside and permanently enjoined.

(2) As to the Hartford-Empire Company's patents. Since this case was argued this Court has had occasion to pass on the Peiler stuffing patent of 1928 in *Hazel-Atlas Co. v. Hartford-Empire Co.*, 64 Sup. Ct. Rep. 997, and *Shawkee Mfg. Co., et al., v. Hartford-Empire Co.*, 64 Sup. Ct. Rep. 1014 (322 U. S. —) both cases decided May 15, 1944. The judgments below in those suits, being infringement suits brought by Hartford-Empire Company on the Peiler patent, were vacated. As to the patent itself, which this Court said * * * must be vacated * * *", such action will require a direct proceeding by the United States. The validity of the Peiler patent first came before the District Court in the case of *Hartford-Empire Company v. Hazel-Atlas Glass Co.*, 39 Fed. (2), 111. That Court decided on February 28, 1930 in favor of the defendant and against the infringement claim of the Hartford-Empire Company. The importance of the Peiler stuffing patent of 1928 to the Hartford-Empire Company is shown in the Government's

brief, p. 231, where it is said in reference to that decision of the District Court:

> "Hartford's plight was then desperate. If that decision was affirmed and gob feeding held to be in the public domain, the plan of Hartford and Owens to monopolize glass-making machinery would collapse".

As to the patents "acquired" by the Hartford-Empire Company about which the Government complains, the Hartford-Empire Company has agreed to "dedicate" them, so that they will also be in the public domain. (Hartford-Empire's brief, p. 142).

As to the remaining patents, we suggest that any decree passed herein should not only, of course, leave the Government free to proceed to vacate any of the patents referred to but should also be without prejudice to any parties as may desire to contest such patents in infringement cases. Surely after the stipulation made by the Government below, it cannot be that the Government could fairly take a contrary position to the one we now urge. In this connection we invite a close reading of the words italicized by the Government *"except as above provided"* in the Government's brief (page 229) and also to the brief of the Hartford-Empire Company (pp. 94 and 95). Even if in trial courts when such a stipulation is made attorneys must be so on the qui vive as to appreciate the significance of such italicized words, still we submit that the Government has not strengthened its position by this reference. All that the italicized words can fairly be held to apply to will be found in the Government's brief, pages 59 to 97 inclusive under these points "(b) Hartford and Owens seek control by uniting against their common adversaries—abuse of the patent laws. (i) planning the joint campaign". Those points have to do only with the question of whether

or not Hartford and Owens had violated the anti-trust laws and nothing whatever with respect to the propriety of the decree, which is the only matter now before us.

We have said that the power of the Court to formulate a decree which will be effective in a practical way is unquestionable, and we agree with the Government that the effect of such a decree should be "to remove the existing evil consequences of appellants' acts and to prevent appellants from promptly resuming in new guises the illegal conduct that created those consequences". (Gov. Brief, p. 329). However, what the Court has done in effect is to confiscate and appropriate all the patent rights of the Hartford-Empire Company. This action of the Court cannot be justified as punishment (Gov. Brief, p. 352), and could only be justified if it were necessary to confiscate the patents in order to make the judgment effective, and there is no such necessity in this case.

This leaves for consideration the proper treatment of the Hartford-Empire Company's licenses. The Government's complaint, pars. 201 to 218 inclusive, sets forth its objections to Hartford's licenses. These objections can be removed.

Paragraphs 21, 22, 23, 24, 25, 26, and 28 of the judgment should be omitted. Compulsory licensing should be required, and all applicants for licenses should be treated upon equal terms and conditions under the same circumstances. The amount of royalties to be charged should be controlled entirely by the operation of economic and market conditions. In this way only can the laws of a free economy be made practically effective; remembering that the competition of paper, plastics, and other materials with glass is always increasing (Gov. Brief, pp. 374 and 381). These conditions should apply to the royalties on all ma-

chines, that is those covered by patents heretofore issued and those covered by patents hereafter issued. Any applicant to whom the equal terms referred to are not accorded should have the right at any time to apply to the Court or to the Attorney-General of the United States for relief. All existing licenses should be cancelled, and the form of the new licenses prepared under the principles laid down by this Court should be agreed to by the parties, and in the event of their inability to agree should be fixed by the District Court. Paragraph 27 and Paragraphs 29 to 57 inclusive of the Judgment should in substance be retained except Paragraph 31 which should be omitted.

Jurisdiction should be retained with the reservation of power to change the terms of the decree. With the retention of jurisdiction and power by the Court and with full access to the records of the Hartford-Empire Company as provided in Paragraph 55 of the Judgment, the Court will have the power and the situation will be such that it can be readily ascertained hereafter whether or not the acts complained of have ceased.

In Note 81 on page 329 of its Brief, the Government agrees that if a fair and competitive industry comes into existence, limitations now placed on the Hartford-Empire Company should then be lifted or modified. In such event the Hartford-Empire Company, we submit, should be given the right to apply to the Court for permission to use its patents in the same way and in the same manner as any other patentee.

In aid of the Court we have designated in an appendix the paragraphs of the judgment to which we object.

CONCLUSION.

For the reasons hereinabove set forth it is respectfully submitted that the judgment of the District Court entered on October 8, 1942 should be affirmed in part and reversed in part and that the case should be remanded to the District Court to pass a new decree in conformity with the views expressed by this Court.

Respectfully submitted,

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APPENDIX.

The parties appearing in this brief approve or disapprove of the several paragraphs in the judgment as indicated:

Paragraphs 1 to 9 inclusive. No objections.

Paragraphs 10 to 26 inclusive. Objected to.

Paragraph 27. No objection.

Paragraph 28. Objected to.

Paragraphs 29 and 30. No objection.

Paragraph 31. Objected to.

Paragraphs 32 to 45 inclusive. No objection.

Paragraph 46. Objected to.

Paragraphs 47 to 49 inclusive. No objections.

Paragraph 50. Objected to.

Paragraphs 51 to 57 inclusive. No objections.

Paragraph 58. Objected to.

Paragraphs 59 and 60. No objections.